MALAYSIAN REPORTS

HABEE BUR RAHMAN v. PUBLIC PROSECUTOR

[A.Cr.J. (B.T.H. Lee J.) March 12, 1971]

[Kuching — Criminal Appeal No. K. 12 of 1970]

Criminal Law and Procedure — Judgment — Supplementing grounds of decision — Sarawak Criminal Procedure Code (Cap. 58) s. 221.

Evidence — Bad character — Admissibility of — Whether prejudices fair trial.

Evidence — Identification by photographs.

It is not permissible for a trial court having signed and delivered its grounds of decision to supplement the grounds of decision or to amplify them in any way. It is however not such conduct as can be said to have occasioned a miscarriage of justice or such as could be said to warrant or require or even justify the trial being regarded a nullity and the conviction being quashed. The only effect of it is that the appellate court must consider the original judgment as it stood and exclude any consideration of the parts added.

It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

Observations on identification by photographs.

Cases referred to :-

(1) *Lee Boon Gan v. R.* [1954] M.L.J. 103.
(2) *Loh Kwang Seang* v. *Public Prosecutor* [1960] M.L.J. 271.
(3) *Ankur Nath Ganguli* v. *Public Prosecutor* [1956] M.L.J. 206.
(4) *Makin* v. *Attorney-General for New South Wales* [1894] A.C. 65.
(5) *R.* v. *Stirland* 30 Cr. App. R. 40 at p. 56.
(6) *Amdumiyan Guljar Patel* v. *Emperor* 1937 Nag. A.I.R. 17 at p. 28.
(7) *Maxwell* v. *Director of Public Prosecutions* [1934] All E.R. Rep. 169.
(8) *Herchun Singh & Ors.* v. *Public Prosecutor* [1969] 2 M.L.J. 209.

MAGISTRATE'S CRIMINAL APPEAL.

T.O. Thomas for the appellant.

Denis Ong Jiew Fook (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

B. T. H. Lee J.: The appellant in this case appeared before the district court at Kuching charged with an offence in contravention of section 379 of the Penal Code.

He claimed trial and was represented by counsel.

In the event the appellant was convicted and sentenced to one month's imprisonment.

The circumstances out of which the charge arose can be very shortly stated. Habee Bur Rahman bin Habee Bur Mohamed, the appellant, was found by the lower court to have committed theft by snatching a wallet containing cash amounting to $60 to $80 belonging to G. A. Koopstra at Padungan Road, Kuching on 17th January, 1970 at about 4.30 a.m.

Against that conviction the appellant appealed on a number of grounds.

At the commencement of this appeal counsel for appellant alleged that the record was irregular in a material particular and drew the court's attention to the fact that certain pieces of evidence were omitted by the lower court and sought to file an affidavit to this effect.

I disallowed the application on the authority of *Lee Boon Gan v. R.*[1] the head-note of which reads as follows: -

"There is no provision of the Criminal Procedure Code which permits affidavits to be filed in a criminal appeal or upon a criminal revision unless so ordered by the High Court."

I have therefore to decide the matter on the material before me.

Dealing for the moment only with judgments I should perhaps comment on the question of supplementing the grounds of decision.

Section 221 of the Sarawak Criminal Procedure Code (Cap. 58) provides as follows: -

"No Court, other than the High Court having once recorded its judgment, shall alter or review the same."

It is not permissible for a trial court having signed and delivered its grounds of decision to supplement the grounds of decision or to amplify them in any way.

It is however not such conduct as can be said to have occasioned a miscarriage of justice or such as can be said to warrant or require or even justify the trial being regarded a nullity and the conviction being quashed.

The only effect of it was that the appellate court must consider the original judgment as it stood and exclude any consideration of the parts added. [See *Loh Kwang Seang* v. *Public Prosecutor*[2] and *Ankur Nath Ganguli* v. *Public Prosecutor*].[3]

I therefore exclude from my consideration the second judgment of the learned magistrate.

I now turn to the second point, namely, the contention that prejudicial evidence of bad character was admitted in evidence which was likely to prejudice the fair trial of the appellant.

It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. [See *Makin* v. *Attorney-General for New South Wales*].[4]

There was evidence that the complainant (P.W.1) was shown photographs of bad characters of the town. He said in evidence that he could not find out who the person was from the photographs

In the case of *R.* v. *Stirland*[5] it was laid down as follows: -

"The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not

a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal."

I do not myself see (as seems to have been the opinion of the court below) that any form of prejudicial evidence had been admitted in evidence at that stage, the complainant having failed to identify anyone in the photographs shown. That however is not the end of the matter.

This apparently happened on the morning of 17th March, 1970. The case was then adjourned to 23rd March and on the continued hearing of the case on 24th March, 1970, counsel for appellant specially recalled the police officer (P.W.7), and by his cross-examination of the inspector had let in the following evidence:

"I believe the accused has a previous conviction. P.O. then makes an application against this matter of previous convictions being brought up."

The witness continued, no doubt upon further cross-examination:

"I have reasons to believe that the accused is not of good character. From the police intelligence and surveillance I know that he is not a person of good character. The intelligence is for police use.

Mr. T. O. Thomas asked the court to make an order that the record of previous conviction be produced."

At this stage the court intervened and the record read as follows:-

"The court states that unless the contrary is proved the accused is of good character."

It will be observed that this line of cross-examination was adopted by counsel for the appellant, and the application for previous convictions to be produced in court was objected to by the prosecution.

The court cannot now regard as a denial of justice the evidence which the defence itself sought and of which the prosecution made timely objections and the prejudicial nature of the evidence which the magistrate (sitting alone without a jury) has rightly excluded from his mind.

In any case, it is open to the court hearing the case to come to its own conclusion after discarding such inadmissible passages (see *Amdumiyan Guljar Patel* v. *Emperor*[6]), and that is precisely what the learned magistrate stated in unequivocal terms.

Reliance was placed by counsel for the appellant on the case of *Maxwell* v. *Director of Public Prosecutions*.[7] For the above reasons I do not see how that case can assist him.

It was admitted throughout in that case that the accused in saying that he had lived a good, clean moral life, has put his character in issue. In other words, he had given evidence of his good character.

The case decided that the fact of the previous charge and acquittal was irrelevant and accordingly no question regarding it should be put to the prisoner in cross-examination.

That was a jury trial and the evidence was likely to lead the minds of the jury astray into false issue.

That case may be said to be a decision on its own facts.

The next matter for consideration is the question of identification by way of photographs.

The learned author of *Sarkar* on Evidence (11th Edition), page 88, has this to say—

"If it is desired that a person, who may be a witness, should identify the photograph of an accused person, the proper course is to show that person a number of photographs of different people (*R.* v. *Melany* (1924) 18 Cr. App. R. 2). There is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing the persons who are able to identify the criminal *a photograph* or series of photographs to see if they can pick out any one of them who resembles the person whom they think they will be able to identify."

It was in evidence that the coffee-shop assistant (P.W.5) was shown only one photograph, and it was that photograph which helped him to identify the accused.

The witness however continued—

"Without photograph I can still identify the accused because he was around the shop a number of times before. He also bought some things from me before. He entered my shop a number of times before that night... The accused came to my shop that night. They were in the shop for two hours... I saw the accused with P.W.1 on that night."

The learned magistrate was of the opinion that the identity of appellant was established in as much as he was identified by P.W.5 who was previously known to him. There was no reason why the prosecution story should be doubted. No motive has been suggested for the appellant being falsely implicated by P.W.5. There was here ample evidence of identification by the complainant and P.W.5 and the learned magistrate accepted their evidence.

The defence is one of *alibi* and the lower court rejected the evidence and did not believe it to be true.

As regards the test identification the learned magistrate rejected that part of the evidence as being unreliable.

There are certain discrepancies in the prosecution evidence regarding the exact time. But these are the kind of discrepancies to be expected and in the learned magistrate's opinion in no way detracted from the evidence.

It is conceded by the prosecution that the complainant (P.W.1) had made statements at variance with the first information report, but that does not justify the learned magistrate in not holding that the complainant was unreliable.

The recent Federal Court case of *Herchun Singh & Others* v. *Public Prosecutor*[8] on the use of first information report and quoted by the prosecution in the lower court at the close of the prosecution case, in my judgment, provides the answer to counsel for appellant's contention on this point.

The learned magistrate had the witnesses before him and was therefore in a better position than an appellate court to evaluate the evidence. I therefore find no ground for interfering with his decision.

The prosecution has not appealed against sentence.

The appeal is accordingly dismissed.

Appeal dismissed.